No. 15577

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KURT KARL FRIEDRICH HEGERICH,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the action for declaratory judgment to review the final administrative deportation order of the Immigration and Naturalization Service under the Administrative Procedures Act (5 U. S. C. 1009), and the Declaratory Judgment Act (28 U. S. C. 2201).

This Court has jurisdiction of this appeal from the findings, conclusions and judgment of the District Court [T. R. 22] in favor of the defendant and against the plaintiff, holding that said deportation order is valid, under the provisions of 28 U. S. C. 1291 and 1294(1), said order being a final decision of the District Court.

Statutes and Regulations Involved.

Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(9)) reads as follows:

> "§1251. Deportable aliens—General classes
>
> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> "(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;"

Section 101(a)(15) of the Immigration and Nationality Act (8 U. S. C. 1101 (a)(15)) reads as follows:

> "§1101. Definitions
>
> "(a) As used in this chapter—
>
> "(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens— . . ."

and then the section proceeds to list classes within which the appellant does not come, *e.g.* such as ambassadors, public ministers, officials, etc.

Section 244(e) of the Immigration and Nationality Act (8 U. S. C. 1254(e)) relates to voluntary departure and provides as follows:

> "The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within

the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection. June 27, 1952, c. 477, Title II, ch. 5, §244, 66 Stat. 214."

Section 242.21 of Title 8 of the Code of Federal Regulations relates to appeals and voluntary departure and provides as follows:

"§242.21 Appeals—(a) Non-appealable cases. An appeal shall not lie from a decision of a special inquiry officer denying an application for voluntary departure or preexamination as a matter of discretion where the special inquiry officer has found the alien statutorily eligible for voluntary departure or eligible for preexamination pursuant to Part 235a of this chapter, and the alien has been in the United States for a period of less than five years at the time of the service of the order to show cause in deportation proceedings. A Notice of Appeal shall not be filed or accepted in any case within the provisions of this paragraph."

Statement of the Case.

This is an appeal from a decision of the District Court, affirming a final order of deportation by the Immigration and Naturalization Service, of appellant, admittedly an alien, after a judicial review of the administrative file which was offered in evidence as Appellee's "Exhibit A", which exhibit is transmitted to this Court in its original form and is not contained in the printed record on appeal.

Appellant is a 47-year-old male, a native and citizen of Germany, who last entered the United States at New York, New York, on February 18, 1956. At the time of his last entry, the appellant was admitted as a non-immigrant visitor for business until May 20, 1956. The appellant has received no extensions of stay and has failed to depart from the United States on or before May 20, 1956, the date of expiration set for his authorized stay, and has remained in this country continuously since his last entry.

In his decision [Ex. A] the Special Inquiry Officer found that appellant was amenable to deportation under the Immigration and Nationality Act on the following grounds, to wit, he was in violation of 241(a)(9) of the Immigration and Nationality Act in that under said Section the appellant was subject to deportation, in that, after admission as a nonimmigrant under Section 101-(a)(15) of said Act, he failed to maintain the nonimmigrant status in which he was admitted or to comply with the conditions of such status. These Sections of the Immigration and Nationality Act are set out in full under the paragraph entitled "Statutes Involved" *supra.*

In his decision [Ex. A] the Special Inquiry Officer stated that although it appeared from the evidence of record that the appellant was statutorily eligible for the privilege of voluntary departure in lieu of deportation, the record failed to present sufficient factors to warrant the grant of voluntary departure. Accordingly, as a matter of administrative discretion, the Special Inquiry Officer denied the application for voluntary departure.

Summary of Argument.

I.

There is reasonable, substantial and probative evidence in the administrative record in evidence, which was reviewed by the District Court, to sustain the finding that the appellant is deportable on the grounds stated; to wit: Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(9)), in that appellant was admitted as a nonimmigrant and failed to maintain his nonimmigrant status in which he was admitted, or to comply with the conditions of such status.

II.

There was no abuse of discretion by the Immigration and Naturalization Service in denying appellant voluntary departure.

ARGUMENT.

I.

The Record Is Clear That the Appellant Is Properly Deportable Pursuant to Section 241(a)(9) of the Immigration and Nationality Act (8 U. S. C. 1251 (a)(9)) as Being an Alien Who Was Admitted as a Nonimmigrant and Who Failed to Maintain His Nonimmigrant Status in Which He Was Admitted or to Comply With the Conditions of Such Status.

In the Appellant's Designation of Points Upon Which He Relies on Appeal [T. R. 26]; his first point is that there is no reliable, probative or substantial evidence to support the finding of deportability and the denial of voluntary departure in lieu of deportation. In considering the tenability of this proposition we need merely to look at the stipulations contained in Plaintiff's Proposed Pretrial Order [T. R. 18]. Here we find that the parties stipulate that the appellant is an alien, a native and national of Germany. We find also that the appellant last entered the United States at New York, New York on February 18, 1956. That at the time of his last entry he was admitted as a nonimmigrant visitor for business until May 20, 1956. That he has received no extensions of stay and that he has failed to depart from the United States on or before May 20, 1956, the date of expiration set for his authorized stay, and that instead he has remained in this country continuously since his last entry. On the basis of these stipulations alone we find admissions to all the essential elements of deportability pursuant

to Section 241(a)(9) of the Immigration and Nationality Act. Since the appellant admits these essential elements of deportability under that Section of the Act, the appellee submits that the claim of no reasonable, substantial or probative evidence to support the finding of deportability under Section 241(a)(9) is untenable.

It appears that the appellant bases his claim upon a misunderstanding; viz., that he was mistakenly informed as to the expiration date of his visa. The appellee submits that the appellant was not justified in relying on any such information received as to the expiration date of the visa when the document itself is clear as to the time he must depart from the United States. Further, it appears that he was admitted to the United States for a limited purpose; namely as a visitor for business and that he had been unsuccessful in transacting any business in his particular field, which was the export and import of electric motors and batteries.

For the reasons stated above, it is appellee's contention and position that the order of deportation is supported by reasonable, substantial and probative evidence. This contention seems particularly fortified in the light of the stipulations made by the appellant in the Pretrial Order appearing on page 18 of the Transcript of Record. Any mistake as to the time of departure from the United States, no matter who caused the mistake, appears to appellee to be totally irrelevant and immaterial to the issue at bar.

II.

There Was No Abuse of Discretion by the Immigration and Naturalization Service in Denying Appellant Voluntary Departure.

The record in this case in no way shows that the Special Inquiry Officer abused his discretion in denying the application for voluntary departure. There must be a clear and manifest showing of an abuse of discretion before a court should interfere with the Attorney General's exercise of such discretion.

Tsiang Hsi Pseng v. Albert Del Guercio, 148 Fed. Supp. 803;

United States ex rel Rongetti v. Neelly, 207 F. 2d 281;

Wolf v. Boyd (9th Cir.), 238 F. 2d 249;

Ickes v. Underwood, 141 F. 2d 546;

Moutsos v. Shaughnessy, 149 Fed. Supp 116;

United States ex rel Hintopoulos, et al. v. Shaughnessy, 25 Law Week 4201.

Appellee respectfully submits, on the basis of the foregoing authority, that a clear showing of abuse of discretion is necessary on the record before the court will interfere with the Attorney General's exercise of discretion in such a case. Upon the record of the Immigration and Naturalization Service, which was reviewed by the District Court and which is transmitted to this Court in its original form, it is clearly shown that there was no abuse of discretion. The appellee, in fact, submits that the record in this case shows only a proper exercise of discretion as contemplated by the Immigration and Nationality Act in Section 244(e). Appellee further submits that the Attorney General's policy in exercising his discretion in cases of this nature is expressed in Title 8

Code of Federal Regulations which Regulations are a guide to the Special Inquiry Officers in exercising the discretionary powers granted to the Immigration and Naturalization Service. It appears clear from the record and the facts surrounding this case that the Special Inquiry Officer's denial of voluntary departure was based solely on the fact that there appeared to him to be an insufficient basis for a grant of voluntary departure in this case. In such a situation as this it is submitted that no Court should interfere with the proper exercise of such discretion by the Attorney General.

In summary, therefore, appellee claims first, that the order of deportation was supported by reasonable, substantial and probative evidence as is clearly shown by the record; and second, that the exercise of discretion in denying voluntary departure in this case was a proper exercise of discretion and the record in no way reflects any abuse of said discretion. Further, that a court should not disturb the Attorney General's exercise of discretion unless the record shows a clear and manifest abuse of said discretion in denying voluntary departure.

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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